United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

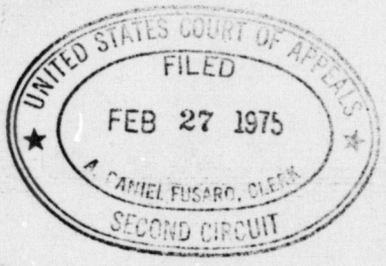
75-2029

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE ELLEN GRUSSE and

MARIE THERESE TURGEON No. 75-2029

BRIEF ON BEHALF OF
WITNESS-APPELLANTS



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ISSUES PRESENTED FOR REVIEW

I. Whether the government has made an adequate denial of the appellants' claims of illegal electronic surveillance of themselves and their counsel.

II. Whether the trial court erred in failing to allow appellants to introduce certain evidence in support of their claims of grand jury abuse and in failing to rule in favor of the appellants' claims in that regard.

III. Whether the grant of immunity to the witnesses is defective as a result of the government's failure to follow the appropriate guidelines of the Department of Justice.

STATEMENT OF THE CASE

The Government moved for an order adjudicating two persons, Marie Turgeon and Ellen Grusse, the appellants, in contempt for failing to answer questions asked at a session of a Federal Grand Jury. The witnesses were called before the Grand Jury on January 28, 1975, at which time they declined to answer questions on various grounds including their privilege against self-incrimination. On February 13, 1975, the Government obtained from the court an order granting the witnesses use immunity pursuant to 18 U.S.C. §6003. That same day the witnesses returned to the Grand Jury and were asked questions concerning their knowledge of two persons who are now fugitives under a Federal indictment in the District of Massachusetts on charges stemming from the robbery of a federally-insured bank. The witnesses refused to answer the questions, invoking various constitutional amendments as well as the claim that the questioning resulted from illegal electronic surveillance. The following day, February 14, 1975, the Government applied to the court for an order compelling the witnesses to answer the specific questions they had been asked and declined to answer the previous day. The requested order was issued. The witnesses then returned to the Grand Jury and again asserted their right to refuse to answer the same questions previously asked. Still later in the afternoon of February 14, the witnesses were presented again in court and were orally

advised by the court to show cause on February 18, 1975, why they should not be adjudicated in contempt for their failure to answer the Grand Jury's questions. On February 18, the witnesses were heard through counsel and submitted memoranda outlining the grounds alleged to justify their refusal to answer questions. On February 19, the appellants were held in civil contempt for failure to answer the questions.

POINT I

THE GOVERNMENT'S "DENIAL" OF ILLEGAL ELECTRONIC SURVEILLANCE WAS TOTALLY INADEQUATE AND DEPRIVED APPELLANTS OF ANY DETERMINATION OF THEIR FOURTH AND SIXTH AMENDMENT CLAIMS.

Appellants (hereinafter referred to as "the witnesses") refused to answer questions put to them in the grand jury room, in part on the ground that those questions were derived from unlawful electronic surveillance of themselves and their lawyers, and of premises in which they or their lawyers had an interest sufficient to confer standing.*

Prior to the contempt hearing, the witnesses served on the government affidavits executed by themselves and their counsel detailing their claims of electronic surveillance. These affidavits specified their reasons for suspecting surveillance and provided the government with a list of addresses and phone numbers to assist the government in checking the records of all the appropriate agencies.**

Less than eighteen hours after receiving the witnesses' claims and affidavits regarding electronic surveillance, the government responded with a vague and

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*/ Since Gelbard v. United States, 408 U.S. 41(1972) the existence of illegal electronic surveillance has been a defense in a grand jury civil contempt proceeding.

**/ The sufficency of the affidavits, as raised by Judge Lumbard in oral argument on Appellants' Bail Motion, will be discussed at Point I(b), infra.

conclusory one-page affidavit. It reads as follows:

> WILLIAM F. DOW, III, being duly sworn, does depose and say:
>
> 1. I am an Assistant United States Attorney assigned to the New Haven office of the United States Attorney for the District of Connecticut;
>
> 2. I have inquired of the appropriate federal authorities to determine whether there has been any electronic surveillance or interception of the wire or oral communications of Ellen Gruse, Marie Theresa Turgeon, Michael Avery, David Rosen, Diane Polan, Rhonda Copelon or Doris Peterson or any electronic surveillance or interception of wire or oral communications occurring on their premises, whether or not they were present or participated in those conversations.
>
> 3. Based on the results of such inquiry I hereby state that there has been no electronic surveillance or interception of wire or oral communications of those individuals named in paragraph Two and that there has been no electronic surveillance or interception of oral or wire communications occurring on their premises.

The facial inadequacy of this "denial" was exacerbated when, at the contempt hearing, Mr. Dow took the stand and described in greater detail the form of his inquiry. His testimony revealed, inter alia, the following shortcomings:

> 1. His "search" included making inquiries of only one individual, namely the FBI agent with supervisory authority over the investigation;
>
> 2. His inquiry was entirely oral and the responses he received were oral. No record was kept of the specific inquiries made and the responses thereto;
>
> 3. The substance of the inquiry was whether or not any part of the investigation of the case consisted of or was derived from interception of

the wire or oral communications of the witnesses. (When the final inquiry was made, the morning of the contempt hearing, that inquiry was broadened slightly to include the lawyers and their staff);

4. There was no inquiry about interceptions except as to interceptions the agent himself deemed relevant to the investigation. Thus, the determination of "relevancy" under Alderman was left solely to one FBI agent;

5. There was no inquiry whatsoever directed to the specific premises in which the witnesses might have an interest;

6. The affiant U.S. Attorney, apparently never even mentioned to the FBI agent the list of addresses and telephone numbers he had received from the witnesses and their counsel, though the significance of those addresses and phone numbers was explained in the affidavits served on him (a point apparently missed by the District Court; see Memorandum of Decision at 6).

7. Affiant made absolutely no inquiry as to the claims of counsel and their staff until the morning the affidavit was made and filed; whatever "search" was made as to those persons and their premises was done by the FBI agent while on the telephone with Mr. Dow;

8. Mr. Dow never requested the FBI agent to check the records of the FBI itself, or the records of any other named agencies;

9. The affiant had no knowledge, in fact, of what--if any--inquiry the agent had made for the purposes of the denial. On each occasion the agent's response to the Assistant U.S. Attorney's query was immediate; neither the first nor the second nor the third time he was asked did the agent indicate to the affiant that he would need time to investigate Bureau files to determine if there was or had been surveillance of the witnesses, or their counsel.

A. The Inadequacy of the Denial

It is the rule in this Circuit that once a witness alleges illegal electronic surveillance,

18 U.S.C. §3504 is triggered and the prosecutor is required

> "... to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked and extending the denial not only to conversations of [appellant] but also to conversations of anyone else occurring on premises owned, leased or licensed by [appellant]."
>
> U.S. v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974)

That rule, employed by other Circuits, e.g. Vielguth v. U.S., 502 F.2d 1257(9th Cir. 1974); U.S. v. Alter, 482 F.2d 1016(9th Cir. 1973), was clearly violated by the instant affidavit's failure to list "which federal agencies had been checked." In fact, of course, only a single FBI agent was queried.

Underscoring this technical failure, however, is the real failure to make inquiry of the federal agencies which might have engaged in surveillance of the witnesses, their premises, e.g. Alderman v. United States, 394 U.S. 165, 176-77(1969), or their attorneys, e.g. Beverly v. United States, 468 F.2d 732(5th Cir. 1972).

It is well recognized that, in addition to the FBI, there are in any given case a number of "appropriate agencies" whose files must be checked for possible illegal surveillance. See e.g. United States v. Aloi, ____ F.2d

_____(2d Cir., Docket # 74-1220, January 31, 1975)*

This recognition has led the United States Attorney's office, at least in this District, to prepare a standard "eight agency search" whenever electronic surveillance is alleged. The agencies included in such search are the FBI, the United States Secret Service, the Internal Revenue Service, The Bureau of Alcohol, Tobacco & Firearms, the Customs Service, Drug Enforcement Administration and the Postal Service.**

When there is reason to believe that an additional agency, outside the list of eight, may have been involved in a particular case, the government may agree,

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*/ In that case, in addition to the FBI and the Department of Justice, inquiry was made of the

> Internal Revenue Service, the United States Postal Service, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Bureau of Customs, the Central Intelligence Agency, the United States Department of Labor, the United States Department of Defense and the United States Department of State.
>
> Id., slip op. at p. 6086

**/ See an example of a standard affidavit in the Southern District in U.S. v. Kearney, 73 Cr. 1039(CBM) attached hereto as Appendix pp A-37. Note that this affidavit, as is usually the case, is prepared by an attorney in the Department of Justice in Washington and forwarded to the District.

e.g. United States v. Raul Estremera, 73 Cr. 319(KTD) (SDNY, February 19, 1975)* or the Court may order, In re Garvey,** Cr. Misc. 74-32(AJZ) (N.D. Cal. February 3, 1975), that the files of that agency must also be searched.

Recent revelations of unauthorized domestic surveillance by agencies such as the CIA*** raise a strong probability that those agencies**** may have been involved wherever the case investigated has political or radical overtones.***** Accordingly, the government should request an interagency search of their

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*/ In that case, involving an alleged member of the Black Liberation Army, the government consented, on the record, at a pre-trial conference, to request a search of the records of both the CIA and "informal" intelligence gathering agencies such as the so-called White House "Plumbers" unit.

**/ In Garvey, after consideration of reported material similar to that which we append here as Appendix pp. Judge Zirpoli ordered the Department of Justice to inquire as to any possible surveillance by the CIA. An affidavit denial by John D. Morrison, Jr., Acting General Counsel of the CIA, has just been filed.

***/ See, e.g., the press material attached at Appendix pp. A-41, consisting of numerous N.Y. Times reports on "spying" and surveillance activities by the CIA. The genesis of much of this material is the testimony of Richard Colby, Director of the Central Intelligence Agency, given before the Senate Appropriations Committee on January 15, 1975. See also, Marchetti and Marks, The CIA and the Cult of Intelligence (New York 1974), at pp. 227 et seq.

****/ Including such surreptitious groups as the "Plumbers" and the so-called "Huston" group.

*****/ Where, for example, the BLA (Kearney, supra) or SLA (Garvey, supra) are involved. The fugitives whom the instant grand jury is investigating, Susan Saxe and Katherine Powers, are alleged to have been members of a similar group.

files in appropriate cases like this one.

The increasing stringency of the factors to be indicated in a §3504 denial is a result of this* and other courts** repeated experience of government denials which are subsequently proven to be false. The need for safeguards, recognized by cases like Toscanino and Alter is no less serious - and, because of the political overtones - perhaps even more serious, in the instant case. For all of these reasons the requirement of

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*/ See United States v. Smilow, 472 F.2d 1193(2d Cir. 1973); United States v. Friedland, 316 F. Supp 459(S.D.N.Y. 1969), aff'd 441 F.2d 855(2d Cir.), cert denied, 404 F.2d 867 (1971); United States v. Desist, 277 F. Supp, 690, 702 (S.D.N.Y.),aff'd 384 F.2d 889(2d Cir. 1967), aff'd 394 U.S. 244(1969).

**/ The record of the government for care and candor is not better in other circuits. See, e.g., United States v. Buck, No. 73-1952(9th Cir., July 27, 1973); In re Tierney, infra; In re Horn, infra; United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) cert.denied, 401 U.S. 996(1971) (Douglas, J., dissenting); United States v. Stassi, 410 F.2d 946(5th Cir. 1969), aff'd after remand, 431 F.2d 353 (5th Cir. 1970); United States v. Hoffa, 402 F.2d 380(7th Cir. 1968), vacated sub nom., Giordano v. United States, 394 U.S. 310(1969), aff'd after remand, 436 F.2d 1243(7th Cir. 1970). cert. denied, 400 U.S. 1000(1971); Gradsky v. United States, 376 F.2d 993(5th Cir.), vacated in part sub nom., Roberts v. United States, 389 U.S. 18(1967); United States v. Smith 321 F. Supp 424(C.D. Cal. 1971) (on remand, reporting admission in court of appeals); United States v. O'Baugh, 304 F. Supp 767,768(D.D.C. 1969); United States v. Taglianetti, 274 F. Supp. 220, 221-222 (D.R.I. 1967), aff'd, 398 F.2d 558(1st Cir. 1968), aff'd. 394 U.S. 316 (1969); United States v. Seale, 461 F.2d 345, 364-66(7th Cir. 1972).

of inquiring of appropriate agencies, and the formal listing thereof,* Toscanino, supra, is a crucial one which this Court should never permit to be breached.

In addition to this obvious facial and factual inadequacy, the affidavit and testimonial exegesis suffers from other reversible error.

It is clear that the "search" done as to the telephones of attorneys Doris Peterson and Rhonda Copelon was totally inadequate. See Beverly v. United States, supra,** since it was done entirely on the phone with an FBI agent on the morning the affidavit was filed. The resulting impossibility of affirmance in no way forecloses relief.***

The Court's citation of those cases ignores several crucial distinctions.

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*/ For the obvious reason of permitting counsel to move, as in Garvey, supra, for inquiry to agencies which have not been checked, but where there is a reasonable and particularized likelihood that surveillance has occurred.

**/ The failure of the denial in that case to include a "premise" where counsel was staying, coupled with counsel's affidavit of suspicious noises over the phone, etc., was deemed sufficient to raise the possibility that "there were overhears of conversations between counsel for the appellant and their clients or with third parties as to matters confidential between attorney and client" Beverly v. United States, supra, at 750. This "possibility" caused the Court to vacate the contempts and remand.

> "to permit specific admissions or denials of the suggestion of illegal electronic surveillance of counsel, followed by a hearing thereon".
>
> Id., at 751, emphasis added.

First, all cases cited were decided before Alter and Toscanino, as discussed above, the increasing disillusionment with pro forma, denials has caused the courts-including this one- to tighten their requirements for an adequate denial under §3504, and the time sequence is thus most significant.

***/ (from preceeding page) The Court wrote:

> " The form and scope of the Government's denial of wiretapping is similar to what has been deemed sufficient by the Court of Appeals for this and three other circuits. United States v. Smilow, 472 F.2d 1193 (2d Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); In re Grumbles, 453 F.2d 119 (3d Cir. 1971); In re Marx, 451 F.2d 466 (1st Cir. 1971)".
>
> (District Court opinion, p.4)

*/ Toscanino is this Court's latest pronouncement on the subject, and we must thus assume it is the law of the Circuit unless and until an en banc decision alters or rescinds it. We fail to understand the District Court's citation of Smilow as in any way respecting "standards of sufficiency" for demands, since in that case, the government's District Court denial was subsequently admitted to be inadequate and the entire issue remanded for a hearing on

> "whether Smilow's conversations were the subject of government wiretapping, whether such surveillance was illegal--- and whether the questions posed to Smilow before the grand jury were the fruits of this alleged illegal activity."
>
> United States v. Smilow, supra, at 1194-95.

Smilow contains no standards of suffiency in conflict with Toscanino.

Second, although the Court in Beverly reluctantly* accepted an affidavit similar to the one in this case, there was no additional information, in the form of cross-examination, to indicate that the prosecutor had not, in fact,

> "caused an inquiry to be made with the appropriate federal agencies"
>
> Affidavit of Guy L. Goodwin, Beverly, supra, at 737 fn. 6.

Here, notwithstanding the affidavit, we know that no such inquiry was made**. This crucial fact distinguishes the instant case from Grumbles and Marx

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*/ The Court said that on the facts of that case it would not require more, but approved the more detailed and complete affidavit and hearing which had been employed in Tierney - and which has subsequently been required in Toscanino and Alter. While holding that the affidavit generally sufficed (although reversing for failure to adequately deny particular allegations by counsel see fn**at p. 8 , supra) it stated

> "nevertheless, we strongly echo the Third Circuit's caution that this form of affidavit 'is far from a 'model' either in terms of its scope or its forthrightness. In re Horn, 3 Cir. 1972 458 F.2d 471"
>
> Beverly, supra at 745

**/ Courts are now requiring exceedingly detailed inquiry. In two unreported 9th Circuit cases, U.S. v. Garvey and U.S. v. Halverson, Nos. 74-1976 and 74-1977 (9th Cir. June 27, 1974) the prosecutor testified and submitted an affidavit that he had checked with all agencies which conducted electronic surveillance under Title III or for national security purposes, and that they had orally informed him that a search of their records failed to produce evidence of wiretapping. The Court reluctantly accepted this hearsay only because the agencies subsequently

as well, these latter cases being even further factually* and legally distinguishable.

The only "standard" we find in Smilow (see fn.* p. 9 ,supra) is one which, has hardly been honored here. The Court wrote,

> "We trust that in the future the Government will be more thorough in the investigation of such matters"
>
> Smilow, supra, at 1195

Apparently and unfortunately, it has not.

** (cont'd from preceeding page)/ submitted written denials. Discussing U.S. v. Alter, supra, the court stated in a footnote that it would have been preferable if the Department of Justice and other appropriate agencies had worked out in affidavit form a certificate which disclosed the agencies' record-keeping method in surveillance matters, the method of examination of those records, and a statement that, based upon that examination, the affiant's statements were made. These cases are reported in National Lawyers Guild: Representation of Witnesses Before Federal Grand Juries, The Witness, July 15, 1974, p.19.

*/ In Crumbles, counsel never objected to the form of the denial and the issue was, accordingly, not presented. Marx was a pre-Gelbard case where the admitted failure to make a denial of possible Alderman material was not found legally cognizable. Interestingly, however, because the government had only denied orally at the District Court level, submitting its affidavit to the Circuit Court in the first instance, the contempt was vacated.

B. The Adequacy of Appellants' Affidavits

At appellants' oral argument on their motion for bail and/or stay pending appeal, some question was raised as to the adequacy of their affidavits to raise the electronic surveillance issue. The question is easily answered.

As to surveillance of the witnesses themselves, the test is simply that an "assertion" of illegal wiretapping triggers the government's obligation to affirm or deny pursuant to §3504. United States v. Toscanino, supra; United States v. Vielguth, supra, at 1258-59; In re Evans, 452 F.2d 1239, 1247-50 (D.C. Cir. 1971).* Such assertion has clearly been made here.

Where surveillance of counsel to a witness is alleged the Fifth Circuit** has set forth the following suggested *** requirements:

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*/ Both Evans and Vielguth analyze the legislative history of §3504 and find it compelling on Congress' determination that the Government must affirm or deny "on no more than a demand by persons who would be aggrieved by such surveillance if it had occurred" Vielguth, supra, at 1259, Evans, supra, at 147-50.

**/ We know of no other court which has done so specifically.

***/ Like the requirements for government denials, supra, the court intended these prospectively, since the actual affidavits which compelled remand were not nearly so detailed.

> "We think such affidavits should as a minimum name the counsel in question, the outside dates of attorney representation and suspected surveillance, the grand jury witnesses represented by such counsel, as well as the numbers pf the telephones over which the surveillance might have occurred and any other data*** tending to identify the suspected surveillance".
>
> Beverly, supra, at 752

The affidavits by counsel in this case were drawn precisely to comply with the Beverly standards and as such are entirely adequate to require a proper and complete affirmance or denial of surveillance under §3504.

Finally, the test as to alleged electronic surveillance of witnesses' premises, but conversations to which they were not parties, is described in United States v. Alter, supra, as similar to the test required when a Sixth Amendment violation is alleged. As the Ninth Circuit wrote in Vielguth, the Alter court intended

> "to apply the same standard of particularity to a 'claim' of violation of the witness's right to privacy [as to his Sixth Amendment counsel claim]"
>
> Id. at 1260

Again, the language of the applicable test has been tracked and the affidavits in the instant case adequately raise the claim.

C. Non-Applicability of In re Persico

In a somewhat tortured argument, the District Court apparently held that under United States v. Persico, 491 F.2d 1156(2d Cir. 1974), a grand jury witness may not litigate the legality of a §3504 denial prior to jailing on a contempt citation. This "holding", if such it be, is, of course, in total conflict with Gelbard* v. United States, supra, and with all the cases previously cited.

No court has heretofore suggested that the denial of unlawful . electronic surveillance required by 28 U.S.C. §3504 may be less responsive, explicit or comprehensive when a claim is made by the statute. The face of the statute itself suggests no basis for a variable standard; it refers alike to

> any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulator body, or other authority of the United States.....
>
> 18 U.S.C. §3504(a)

Persico, by contrast, construed 18 U.S.C. §2518 (10)(a), a provision which excludes grand juries from

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*/ The Persico decision itself expressly distinguishes the situation presented there from that of Gelbard and, accordingly, this case. Persico, Id. at 1160.

the bodies before which motions to suppress may be made. The statutory scheme suggests, contrary to the holding of the District Court, that while the bases for suppression of evidence may be more limited in the grand jury than in other contexts, the right to either an admission or an adequate denial of electronic surveillance is not.

Further, Persico involved an admission of legally obtained, that is, court ordered - electronic surveillance as opposed to the illegal, warrantless type claimed here.

In the former case, the surveillance is prima facie legal and as such does not require a plenary hearing on admissibility* before the grand jury can continue. Persico, supra, at 1161-1162. By definition, at least one** neutral magistrate has already passed on the legality of the tapping.

In the latter case, however, no such neutral evaluation of the allegedly illegal surveillance has ever occurred, and the "very heart of the Fourth Amendment", United States v. United States District Court, 407 U.S. 297(1972) compels a determination of

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*/ The difference between "admissibility" of evidence in Persico, and "defense" to a civil contempt, Gelbard, etc. is obviously crucial in terms of due process safeguards.

**/ In Persico the District Court also examined the warrants in camera and found them constitutionally adequate.

the legalilty of otherwise unfettered prosecutorial acts. e.g. Gerstein v. Pugh, ____U.S.____, 43 U.S.L.W. 4230 (February 18, 1975).*

The opinion in Persico itself concludes that its rationale cannot apply

> "When the government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no court order was obtained..."
>
> Persico, supra, at 1161

It is precisely such illegal, warrantless surveillance which the witnesses allege. Every case cited in this brief holds that they are, at this stage of the proceeding, entitled to a determination of their constitutional claim. Such determination may only be made when the government has filed an adequate and complete denial of their allegations. As the Government has not yet complied with §3504, the contempts must be vacated and the case remanded.

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*/ The Court there wrote

> " ... in Coolidge v. New Hampshire, 403 U.S. 449-453(1971),[we] held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in Shadwick v. City of Tampa, 407 U.S. 345(1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also United States v. U.S. District Court, 407U.S. 297,317(1972)"
>
> Gerstein,id. at 4234-35.

II. COMPULSION OF THE WITNESSES' TESTIMONY CONSTITUTED AN ABUSE OF THE GRAND JURY PROCESS

A. The Grand Jury Process Is Being Abused In That It Is Being Used As A Tool Of The FBI In Its Search For Fugitives.

The witnesses herein had claimed from the beginning of the proceedings that compulsion of their testimony was an abuse of the grand jury process. On January 28, 1975, prior to their first appearance before the grand jury, the witnesses moved to quash the subpoenas on the ground that they constituted an abuse of grand jury process. In particular, they alleged that the grand jury was not conducting an investigation into the existence of possible crimes in the District of Connecticut for the purposes of issuing indictments in connection therewith; that the grand jury was being used for the purpose of preparing an already pending indictment for trial; that the grand jury was being used as a method of gathering intelligence data for the Federal Bureau of Investigation; and that the testimony taken by the grand jury would be disclosed to unauthorized persons, including agents of the F.B.I. The witnesses continued to assert these claims at every stage of the proceedings.

At the time of the Motion to Quash the original subpoenas, counsel for the witnesses indicated that his belief that the purpose of the investigation was to gather information about the whereabouts of two fugitives, rather than to inquire into the possible commission of crimes in the District of Connecticut, was based on a conversation between

counsel and an F.B.I. agent and the Assistant U.S. Attorney handling the matter. At that juncture the Court inquired of the Assistant whether the grand jury was investigating possible crimes in this District, and accepted the representation of government counsel that it was.

During the course of the proceedings herein, the government made no showing in support of the representation of the Assistant U.S. Attorney. Proceedings in front of the grand jury, read into the record at the time of the government's motion to compel the witnesses to answer questions, reflected that although the Assistant U.S. Attorney characterized the purpose of the proceedings as an inquiry into the possible violation of federal statutes in Connecticut, the foreman of the grand jury indicated that the inquiry was connected with the commission of a bank robbery in Boston. Nothing in the foreman's characterization of the purpose of the inquiry reflected an awareness that commission of crimes in Connecticut was at issue.

On page 20 of the Transcript of the motion to compel testimony, which was argued on February 14, 1975, the grand jury foreman is quoted as saying to Ms. Grusse when she was in the grand jury room:

> Could I ask one question? Do you understand the description of the reasons that you are being called here, that Attorney Dow just stated? Do you understand that the purpose of this grand jury is to investigate a crime that was committed in Boston in 1970, and your possible knowledge of any of--of any of the facts concerning the whereabout of the people, the perpetrators of the crime? Do you understand

that is the reason why you are being asked to be here? Notwithstanding the claims of the U.S. Attorney that violations of federal statutes in the district of Connecticut were also the subject of the grand jury's questions, the grand jury foreman's statement presents a prima facie case of abuse of the grand jury function. As this Court said in U.S. v. Dardi, 330 F.2d 316, 336 (1964),

> It is improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial...

See also, Beverly v. United States, 468 F.2d 732, 743.

Additional evidence that the grand jury is being used in this case as a tool of the FBI investigation is the fact that FBI agents have not contented themselves with seeking to interview the witnesses, but have also gone so far as to harrass the friends and relatives of these two witnesses when they refused to answer questions. In addition to seeking out the witnesses' relatives as far away as Lewiston, Maine and Baltimore, Maryland, the FBI has resorted to informing their family and friends about their personal lifestyles and has told these relatives intimate details of the witnesses' private lives. Affidavits setting forth the behavior of the FBI agents were submitted to the district court at the time of the contempt hearing.

B. The District Court Erred In Refusing To Allow Witnesses To Present Testimony On The Subject Of Grand Jury Abuse At The Contempt Hearing, Thus Denying Them Due Process Of Law In Violation Of The Fifth Amendment To The United

States Constitution.

At the hearing on the government's motion to hold the witnesses in contempt, counsel for the witnesses indicated to the Court that he had subpoenaed Thomas Dugan, special agent in charge of the FBI in Connecticut, to testify, and that he also sought to call the Assistant U.S. Attorney to the witness stand. The government indicated that it would move to quash the subpoena to the agent, and the Court inquired what the purpose of the testimony would be.

Counsel for the witnesses indicated the aim of the testimony would be twofold: 1) to establish the FBI's purpose in asking the grand jury to subpoena the two witnesses and, 2) to discover the extent of the information already in the possession of the FBI regarding the questions which had been posed to the witnesses. In particular, counsel indicated to the court that a substantial amount of information relevant to the grand jury's inquiries had been disclosed by agent Dugan to a newspaper reporter and this information had appeared in an article published in the New Haven Register newspaper on February 17, 1975, the day before the contempt hearing. This newspaper article was submitted to the court to demonstrate the breadth of the FBI's information as disclosed to the press and the public.

From the reading of this particular newspaper article, which is attached here as Exhibit B , an inference can be made that the information which the grand jury had sought

to elicit from the appellants was already in the possession of the FBI. Further, it is clear from this article and from another, later newspaper piece, published on February 23, 1975, in the Boston Globe, that the FBI's purpose in questioning women in Connecticut and in seeking grand jury subpoenas for the appellants is to find the missing fugitives.

Notwithstanding the claims of grand jury secrecy and the supposed inquiry into violations of federal statutes in Connecticut, the FBI's detailed disclosures to the press give further credence to the notion that the agency will use any and all institutions--including the mass media and the grand jury--in its search for missing fugitives.

Counsel further indicated to the court that he deemed it necessary to call to the witness stand the Assistant U.S. Attorney, for the purpose of informing the court as to the conversation which had taken place between the Assistant and counsel to the witnesses on the occassion of their first appearance before the grand jury, on January 28, 1975. In particular, this testimony would have proved that the purpose of the grand jury was not to issue indictments, but rather was to find fugitives, since the government had, on January 28, offered to withdraw the subpoenas if the witnesses would consent to an interview with the FBI.

Notwithstanding the fact that the government has asserted that the purpose of its inquiry was legitimate, and notwithstanding the fact that the specific questions put

to the witnesses arguably ask for information relevant to violations of federal statutes, the trial court erred in refusing to permit the appellants to call witnesses on the question of abuse of the grand jury process and appellants claim they should have been allowed to develop a factual basis for their assertions that the inquiry constituted an abuse of process through the introduction of testimony of FBI agent Dugan and the Assistant U.S. Attorney.

The law is clear that one charged with contempt of court has the right to call witnesses on her behalf. In Cooke v. United States, 267 U.S. 517 (1924), the Court overturned a contempt conviction as a result of the summary nature of the proceedings. The Court stated:

> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. Id., at 537.

In re Oliver, 333 U.S. 257 (1947), involved a contempt conviction of a witness before a one-man grand jury in Michigan for giving false and evasive testimony. Although the contempt in this case was styled as criminal, its purpose was apparently the same as a civil contempt, for the order indicated that the witness could purge the contempt by testifying to the satisfaction of the judge-grand jury. The

Court, citing Cooke, reiterated that the witness must be afforded "a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." Id., at 275. The rationale for the rule is the deprivation of liberty occasioned by the contempt conviction. "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal." Id., at 278. See, also, Groppi v. Leslie, 404 U.S. 496 (1972).

It is apparent from these Supreme Court cases that the right to call witnesses is a liberal one, to be broadly interpreted, extending even to testimony in mitigation or explanation of the conduct in question. In this Circuit, it is well recognized that a witness may introduce testimony in defense of a refusal to testify. In United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), the Court held that a witness was entitled to a rehearing on the question of his right to assert attorney-client privilege, even though he had made no offer of proof at the time of the hearing. See, also, In re Bonanno, 344 F.2d 830 (2d Cir. 1965).

The case most closely on point is In re Green, 369 U.S. 689 (1961). In that case, an attorney was held in contempt of court for advising labor union members to continue to picket in violation of a state injunction. The trial court refused to allow an evidentiary hearing on the question of whether the state court's jurisdiction in the matter was

pre-empted by the National Labor Relations Board. The Court held that the Fourteenth Amendment was violated by the contempt conviction in the absence of the opportunity to introduce evidence on that question.

In Harris v. United States, 382 U.S. 162 (1965), a grand jury witness was held in criminal contempt, and given a prison sentence under Rule 42(a) of the Federal Rules of Criminal Procedure in a summary proceeding. The Court held that he was entitled to notice and hearing as provided by Rule 42(b). The witness had argued that if he had been granted a hearing, he would have called witnesses, including grand jurors, to prove that there could have been no violation of the Communications Act. The Court decided:

> Our point is that a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. Then courts will not act on surmise or suspicion but will come to the sentencing stage of the proceeding with insight and understanding. Id., at 167.

The witnesses herein submit that only a hearing in this case, in which they would have had the full rights to offer testimony from profferred witnesses, could have established whether there had been an abuse of the grand jury function or not.

In this case, the Court should have allowed the witnesses an opportunity to call the F.B.I. agent and the Assistant U.S. Attorney to establish their argument that there was an abuse of the grand jury process, and that the grand jury was acting without

its jurisdiction insofar as its inquiry was concerned with previously issued indictments from Massachusetts. Rather than affording the witnesses an "uninhibited adversary hearing" on this issue, the Court allowed only the "perfunctory reception of affidavits, a round of oral argument, and some offers for the record," condemned in United States v. Alter, 482 F.2d 1016, 1023, 1024 (9th Cir. 1973).

Abuse of grand jury process, particularly to gather information for the F.B.I., has become a frequent occurrence. See, Donner and Cerruti, "The Grand Jury Network," The Nation, Jan. 2, 1972; Cowan, "The New Grand Jury," New York Times Magazine, March 1973; Fine, "Federal Grand Jury Investigation of Political Dissidents," 7 Harv. Civ. Rts.- Civ. Lib. L. Rev. 432 (1972).

At the very least, the witnesses must be permitted a full evidentiary hearing on the question of abuse of the grand jury process, including the right to call witnesses. In order for the trial court to adequately determine whether the grand jury has been abused, it is also necessary for that court to examine the grand jury minutes, to ascertain what the grand jury members themselves considered the purpose of their inquiry. Appellant would urge that they be permitted to examine the minutes of the grand jury but concede that arguably the court might deem it necessary to conduct such an examination in camera.

C. If Given A Full Hearing On The Issue Of Grand Jury Abuse And An Opportunity To Prove Their Claims, The Witnesses Would Be Entitled To Relief On The Merits.

The primary function of the federal Grand Jury, as set out in the Fifth Amendment, is to insure that

> no person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury.

Its historic purpose has been to provide a shield between individuals subject to indictment and the power of the state as personified by the United States Attorney. The Grand Jury is to act

> as a primary security to the innocent against hasty, malicious and oppressive prosecution... ser[ving] the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, a minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. Wood v. Georgia, 370 U.S. 375, 390 (1962).

It is within the power and responsibility of the court to halt abuses of the Grand Jury process. Numerous Supreme Court cases have recognized that the federal district courts must supervise the Grand Juries sitting in their jurisdiction. Hale v. Henkel, 201 U.S. 43, 65 (1906); Hoffman v. United States, 341 U.S. 479, 485 (1951); Branzburg v. Hayes, 408 U.S. 665, 707 (1972); United States v. Dionisio, 93 S. Ct. 764, 770 (1973). Furthermore, grand jury investigations proceed by way of the compulsion behind the subpoena power, a process of the court whose abuse is subject to federal court supervision. Rea v. United States, 350 U.S. 214, 217

(1956). See also United States v. Pack, 150 F.Supp. 262, 264 (D. Dela. 1957); In re Minkoff, 349 F.Supp. 154 (D. R.I. 1972). Hopefully, the Supreme Court's early faith in the court's vigilance in these matters will prove well-founded:

> Doubtless abuses of this [subpoena] power may by imagined...But were such abuses called to the attention of the Court, it would doubtless be alert to repress them. Hale v. Henkel, supra, at 65.

The Grand Jury may legitimately seek information bearing upon its decision whether or not to indict or in some cases (under 18 U.S.C. §3332) to issue reports. The scope of these investigatory powers is necessarily broad. Blair v. United States, 250 U.S. 273 (1919); Branzburg v. Hayes, supra; United States v. Dionisio, supra; Costello v. United States, 350 U.S. 359 (1956). However, there are boundaries to these investigatory powers, to go beyond which constitutes abuse of the grand jury process. One such boundary is jurisdictional.

A Grand Jury in one federal judicial district has no authority to direct its inquiry into offenses committed solely in another district. Brown v. United States, 245 F.2d 549 (8th Cir. 1957). The Brown court reversed a conviction for perjury before a grand jury where it had no jurisdiction over the matters investigated. See, also, In re National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922), 8 Moore's Federal Practice §6.04 (2d ed., 1972). We argue here that the witnesses had standing to challenge

the jurisdiction of the Grand Jury to pursue its current investigation. In any event, however, the district court was not restricted by the standing of the witnesses who brought the abuses to the court's attention, but should have corrected them in the exercise of its supervisory powers on its own motion.

Current standing law seems to have developed a two-level test in which the person must allege an "inquiry in fact" which is arguably within the "zone of interests" protected by the provision under which the injury arises. Association of Data Processing Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970).

Facing jail for contempt for refusing to testify before a grand jury which is investigating crimes outside its jurisdiction clearly brings the witnesses under this test. Moreover, as recognized recently in Sierra Club v. Mason, 351 F.Supp. 419, 424 (D. Conn. 1972), federal standing law is moving toward collapsing the two requirements into one of "injury in fact," signaling a recognition that a decision on standing effectively adjudicates the merits of most cases so litigated. As Professor Davis puts it:

> A careful examination of the federal and state law of standing leads to the conclusion that a very simple and natural proposition is entirely sound: One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable. Kenneth C. Davis, Administrative Law Treatise, 1970 Supplement, §22.18.

In any event, when abuse of the grand jury's jurisdiction is clear or its possibility great, a court is often held to be under the obligation to examine the purpose of the inquiry on its own motion. Application of Iaconi, 120 F.Supp. 589 (D. Mass. 1954). The power to prevent abuse is not restricted by the standing of the witness who brings it to the court's attention. See, also, United States v. Pack, 150 F. Supp. 262 (D. Del. 1957); In re Grand Jury Investigation [General Motors], 32 F.R.D. 175 181 (S.D. N.Y.) appeal dismissed, 318 F.2d 533 (2d Cir. 1963), cert denied, 375 U.S. 802 (1963).

The most significant abuse of process alleged here was the use of the grand jury as a tool by the F.B.I. to conduct its investigation. Congress has refused to grant general investigatory power to the Justice Department or the F.B.I., although numerous administrative agencies have this power within limited scope. Justice Black, in United States v. Minker, 350 U.S. 179, 191 (1956), stated:

> Apparently Congress has never even attempted to vest FBI agents with...private inquisitorial power. Indeed, this Court has construed congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors. McNabb v. United States, 318 U.S. 332; Upshaw v. United States, 335 U.S. 410. And we have frequently set aside state criminal convictions as a denial of due process of law because of coercive questioning of suspects by public prosecutors and other law enforcement officers in their official chambers. See, e.g., Watts v. Indiana, 338 U.S. 49; Harris v. South Carolina, 338 U.S. 68; Chambers v. Florida, 309 U.S. 227.

If the F.B.I. itself does not have such inquisitorial power, clearly it would be an abuse of the grand jury to allow it to be used by the F.B.I. to compel answers to questions it could not compel itself. This would be so if the purpose of the grand jury investigation was to perform this function for the F.B.I., rather than to investigate crimes, which is what the appellants offerred to prove in this case.

Use of a grand jury by government agents to compel acts which the agents themselves have no right to compel was condemned in In re Dionisio, 442 F.2d 276 (7th Cir. 1971) and In re September 1971 Grand Jury [Mara], 454 F.2d 580 (7th Cir. 1971). In the first of these cases, the government sought to compel voice exemplars before the grand jury and in the second, to compel handwriting samples. The Seventh Circuit held that the Fourth Amendment would be violated in the absence of a showing of reasonableness, treating both demands as searches within the meaning of the Fourth Amendment. In Mara, the Court characterized the actions of the government as an attempt "to circumvent the requirements of the Fourth Amendment by interposing the grand jury between it and the citizen under investigation." 454 F.2d at 584.

Both cases were reversed by the Supreme Court. United States v. Dionisio, 410 U.S. 1 (1973) and United States v. Mara, 410 U.S. 19 (1973). However, the grounds for reversal were that the witnesses had no Fourth Amendment protections with regard to the voice exemplars and hand-

writing exemplars. The Court did not reach the issue of whether if they had been entitled to such protection, the use by the government of the grand jury would have amounted to an abuse.

There is language in these opinions by the Supreme Court concerning the undesirability of saddling grand juries with mini-trials and preliminary showings. However, the Court also repeats its injunction that a grand jury may not trench upon the legitimate rights of any witnesses called before it. The policy against a plethora of mini-trials is properly seen as applicable to those claims that would require the government to make certain types of showing before a witnesses produces documents, or given exemplars, or perhaps at the time a witness simply moves to quash a subpoena prior to appearance before the grand jury. However, after a witness has made several appearances before the grand jury and has refused to testify, and stands before the court at a contempt hearing, the policy is different. At that stage, the witness is certainly entitled to require such evidentiary showings as are necessary to establish her claim that she had just cause for refusing to answer the questions.

The association of the entire proceedings with the F.B.I. inevitably leads to violation of Federal Rule of Criminal Procedure 6(e). Denial of the witnesses' Motion for Protective Order aggravates this risk. Federal Rule of Criminal Procedure 6(e), the secrecy provision, provides

that grand jury proceedings must be conducted in secret. Disclosure of minutes can be made only upon a court order in connection with judicial proceedings or a motion to dismiss an indictment. Exceptions to this rule are made for the witnesses themselves and for matters other than deliberations and the vote of any juror and for "attorneys for the government for use in the performance of their duties." Attorneys for the Government are defined by Rule 54(c) of the Federal Rules of Criminal Procedure as

> ...the Attorney General, an authorized Assistant of the Attorney General, a United States Attorney, an authorized Assistant of a United States Attorney...

It is an abuse for a grand jury to pursue an investigation in bad faith for the purpose of disclosing information to government agents within the Executive branch. Agents of departments other than the Justice Department may have access to subpoenaed records and the testimony of witnesses only to assist the grand jury making its investigations. In In re April 1956 Term Grand Jury, 239 F.2d 263, 272 (7th Cir. 1956), the court held:

> While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury as an assistance to it, we also hold that persons, non-members of the grand jury, thus having access to said records and documents, have no right to sue them for any purpose whatsoever except to assist the grand jury in its work.

This injunction would clearly be violated in the instant case, were the appellants allowed to prove that the Assistant U.S. Attorney intended to turn the testimony of the witnesses over to F.B.I. agents, not for the purpose of assisting the grand jury, but for the purpose of apprehending fugitives.

In In re William H. Pflaumer and Sons, Inc., 53 F.R.D. 464, at 476-77 (E.D. Pa. 1971), the court held that materials could be turned over to Treasury agents, only so long as the records remained under the aegis of the United States Attorney.

The present case is not one in which the grand jury requires the assistance of expert agents from government departments in order to do its work. The issues which the government has claimed they are investigating are very clear, and do not require F.B.I. assistance to be elucidated. Therefore, should the appellants be able to prove that revelation of testimony to the F.B.I. is contemplated, the truth of their argument that the grand jury has been abused will have been demonstrated.

III. WITNESSES SHOULD NOT HAVE BEEN GRANTED IMMUNITY PURSUANT TO 18 U.S.C. §6002 et seq. BECAUSE THE GOVERNMENT FAILED TO FOLLOW THE GUIDELINES SET UP BY THE DEPARTMENT OF JUSTICE GOVERNING APPLICATIONS FOR GRANTS OF IMMUNITY UNDER THESE STATUTES.

In a letter of November 30, 1971 to Rep. Emmanuel Celler, then Chairman of the House Judiciary Committee, Attorney General Richard Kleindienst outlined the existence and content of written Department of Justice Guidelines regarding the circumstances and criteria under which an immunity grant pursuant to 18 U.S.C. §§6002 - 3 will be made. These guidelines constitute and purported to constitute an authoritative interpretation by the Department of Justice, through its chief executive, of the procedures to be followed and the policies served in connection with the immunity provisions of 18 U.S.C. §§6002 - 3. A text of the letter and guidelines is attached hereto as Exhibit A. The Attorney General's statement, submitted as an addition to the prior sworn testimony of Associate deputy Attorney General Wood to the committee, in aid of its duty to legislate with a comprehensive knowledge of the existing structure of regulations, policies and procedures of the Department of Justice, became at the moment of its promulgation both a constraint binding on the conduct of the actors within its purview and a standard upon which the House Judiciary Committee and all other interested parties were entitled to rely, notwithstanding the refusal or failure of the Department of Justice to

embody the guidelines in a formally promulgated and published rule as envisioned by the Administrative Procedure Act 5 U.S.C. §551 et seq. Two separate questions must be answered in this connection: the legal status, scope and effect of the guidelines, and the standing of grand jury witnesses to assert rights arising under them.

A. The Guidelines Are Mandatory And Binding Upon The Department And Its Agents And Proof Of Compliance With Them Is a Condition Precedent To The Granting Of Immunity By The Court.

The significance of any inquiry into the legal status of the Department of Justice guidelines regarding the grant of immunity depends solely upon the axiom of administrative law that a rule promulgated by a governmental agency must, so far as constitutionally permissible and consistently with the authorizing legislation, be given the force and effect of law, and must be construed so as to bind not only outside parties whose interests may be within the zone affected by the rule, but the issuing agency as well. Columbia Broadcasting System v. United States, 316 U.S. 407 (1942); United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959); Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966). Far from being a mere rule of convenience, this axiom of administrative law possesses a broad constitutional basis in the due process prohibitions against arbitrary governmental actions adversely affecting the interests

of private parties, and in the constitutional requirement for notice as to both the substance and the procedures governing agency processes into which the interests of a private party may be drawn. Moreover, it is equally clear that any agency decision reached in purported observance of a governing administrative rule must be supported by and consistent with the rule upon which the agency claims to place its reliance. SEC v. Chenery Corp., 332 U.S. 194 (1947). On this basis the effect of the failure of the Department of Justice to offer proof of compliance with its immunity guidelines is clear: if the guidelines possess the stature of a rule within the governing precedents, allegations of departmental noncompliance unless effectively rebutted render the immunity grant void, and of no greater effect than if the explicit statutory requirements of 18 U.S.C. §6003 had not been met.

Although the legal status and effect of the guidelines here in question has not been decided as yet by the United States Supreme Court, two cases in the Fifth Circuit have held that the guidelines did not create rights vested in the recipient of the immunity grant. In Re Tierney, 465 F.2d 806 (5th Cir. 1972); Beverley v. United States, 468 F.2d 732 (5th Cir. 1972). In both instances, a shoddy legal analysis is founded on a common erroneous factual assumption, which was stated in Tierney as follows: "The guidelines on which appellants rely are directed to

the handling of requests by United States Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses." 465 F.2d 806, 813. As noted more extensively below, the guidelines are explicitly directed on their face to the protection of important substantive rights of prospective witnesses, such as freedom from physical reprisal for compelled testimony and the protection of close personal relationships from strain not demonstrably essential to the administration of justice. Clearly, rights such as these are exclusively those of prospective witnesses. The very fact of the fundamental substantive rights of the witnesses, tied up with the existence and promulgation of departmental guidelines governing the criteria for approval of immunity requests, gives rise to a procedural right, vested in the prospective witness, that the guidelines be observed and that the departmental disposition of the immunity request be supported by and consistent with the guidelines.

In addition to their internal flaws and inconsistencies, Tierney and Beverley also attach an exaggerated and unwarranted importance to the merely formal designation of the standards in question as "guidelines" rather than "rules." In so doing they run counter to a persistent and growing trend in federal law toward insistence on administrative discretion constrained by explicit and

binding standards governing the substance and the procedures of agency action, notwithstanding the semantic stratagems sometimes employed by such agencies in an attempt to avoid the more stringent scrutiny and scrupulous observance required by the judicial branch when the administrative utterance has risen to the level of a "rule."

A major example of this trend, and one closely analagous to the present instance is the evolution of judicial effect given to Policy and Procedure Memoranda (PPM's) of the Federal Highway Administration. These are issued by the Federal Highway Administration as standards in governance of its activities. They are not published in the Federal Register, indexed, publicly announced or distributed or otherwise treated as administrative regulations under the provisions of the Administrative Procedure Act 5 U.S.C. §552 et seq. Indeed, the Federal Highway Administration, and the Department of Transportation have promulgated and duly enacted a regulation, pursuant to the requirements of the Administrative Procedure Act, to the effect that the PPM's and other administrative and procedural memoranda or like variety are <u>not</u> regulations, and create no rights not specifically stated therein. 23 C.F.R. §1.32. Notwithstanding this explicit disavowal of the binding character of the PPM's by the "promulgating" agency, and notwithstanding a substantial history of usage consistent with the agency's position, courts have con-

sistently held that the agency's assertions in regard to the status and effect of the PPM's are not only inconclusive on the courts, but are wrong. D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C.Cir. 1970); Citizens to Preserve Overton Park v. Volpe, 309 F.Supp. 1189 (W.D.Tenn.) aff'd 432 F.2d 1307 (6th Cir.), rev'd on other grounds 401 U.S. 402 (1970). Moreover, once again notwithstanding the vigorous objection of the agencies involved, the Comptroller General has ruled that the agencies' attempt to shield itself from the consequences acknowledging the status of their memoranda as "rules" must fail, and that the PPM's have the force and effect of law, are binding upon the agency until amendment or repeal, and are not subject to retroactive waiver. 43 Comp. Gen. 31 (1964). As commentators have rightly noted, justice requires the treatment of such "guidelines" as rules within the meaning and effect of the Administrative Procedure Act, and that "it is doubtful that the courts would tolerate an agency's attempt to shield itself from judicial review by such rulemaking, especially in view of the Supreme Court's 'generous' treatment of claims to judicial review under Section 10 (a) of the APA which provided that a 'person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action...is entitled to judicial review thereof.'" [citing Tooahrippah v. Hickel, 397 U.S. 598 (1970); City

of Chicago v. United States, 396 U.S. 162 (1969); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)] Gray, "Environmental Regulation of Highway and Historic Preservation Legislation," 20 Catholic U.L.R. 45, 62 N. 66 (1970). See also Ronald C. Peterson and Robert M. Kennan, Jr., "The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation" 2 ELR 50001 (1972). Strong indication that the Supreme Court is unimpressed with a formalistic subterfuge of this variety, and of the variety here in question, came in Triangle Improvement Council v. Richie, 402 U.S. 497 (1971) where in the dissenting and concurring opinions of five justices an informal Department of Transportation memorandum (IM 80-1-68 (Sept. 5, 1968) is treated as a "regulation" without deeming the contrary viewpoint even worthy of argumentative rebuttal, and proceeded to treat the memorandum as a regulation binding on both the private parties and the promulgating agency. More recently, the internal manuals of the Forest Service have been held to constitute "regulations" within the meaning and to the effect envisioned in the Administrative Procedure Act. Parker v. United States, 448 F. 2d 793 (10th Cir. 1971), cert. denied 405 U.S. 989 (1972).

The development and existence of binding usages, pronouncements and conduct by governmental agencies entirely apart from the formal rule-making structure is both ancient and, in the view of modern commentators, commend-

able. In 1833, the Supreme Court noted that "usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." United States v. MacDanial, 32 U.S. 1, 14, 15 (1833). More recently, Professor Kenneth C. Davis observed:

> The proposition that an officer with discretionary power may state how he will exercise his power has the merit of being both simple and obvious. The Attorney General may announce, as he once did, that the Department of Justice never prosecutes for criminal libel. See Hearings before Subcommittee of the Senate Judiciary Committee, 77th Congress, 1st Session, on Nomination of Robert H. Jackson to be an Associate Justice of the Supreme Court, 47-69 (1941). A police chief may announce: 'We don't arrest for five miles in excess of the speed limit.' What is simple and obvious is that these announcements may be made and that they may have the desirable effect of confining discretionary power. Davis, Administrative Law Treatise, 1970 Supplement, 16.16.

In another section, Professor Davis noted that "in some circumstances even a speech of a commissioner may have about the same effect as formal rules, especially if the speech authoritatively states enforcement of adjudication policy. If by any informal method, including a press release, a prosecuting agency makes known what it will not prosecute, the result may be closely akin to a rule." Davis, Administrative Law Treatise, §5.01. Thus, as Davis notes approvingly, the trend in the relevant federal law has been toward increasing stringency in holding admini-

strative officials to the guidelines and policies which they pronounce, notwithstanding their failure to formally promulgate rules under the existing statutory procedures.

In 1960, the Supreme Court vacated a criminal indictment and conviction at the instance of the defendant appellant and the Solicitor General in reliance on a Department of Justice "policy" against multiple federal prosecutions for the same transaction or occurrence. Petite v. United States, 361 U.S. 529 (1960). In that instance, the "policy" relied upon in vacating the indictment and conviction was, in the terms of Mr. Justice Brennan's concurring opinion, in its only written expression not even applicable to the case at bar. 361 U.S. 529, 33. In this case, the written expression of the controlling guidelines is clearly applicable to the circumstances at hand. The policy of Petite, as well as the factors outlined above, require that the Department of Justice, like any other governmental agency, be held to account for the conscientious observance and application of standards which it has itself publicly articulated as governing and constraining the exercise of its discretionary behavior.

In addition, this Circuit has in the past required that a branch of the government, the military service, abide by its own regulations before making a decision on an enlisted man's application for a hardship discharge.

In Feliciano v. Laird, 426 F.2d 424, 427 (1970), the Court held:

> As the Army failed to follow its own regulations in considering Feliciano's application for a hardship discharge it is the kind of error that we do not hesitate to rectify.

B. Grand Jury Witnesses Have Standing To Inquire Into Compliance By Department of Justice With Its Guidelines Governing The Granting Of Immunity And To Complain Against Non-Compliance With Them.

As the foregoing has made clear, the immunity guidelines promulgated by the Department of Justice are, in nature and effect to be considered and treated as rules with which the Department must comply as a condition precedent to the granting of immunity by the court. The question remains, however, of the standing of grand jury witnesses to inquire into Departmental compliance with the guidelines and to complain of their violation. Without standing on the part of the witnesses, violation of the guidelines would await redress in a forum other than a hearing to compel testimony or a contempt hearing for failure to do so. Indeed, as the court in Tierney implicitly held, if standing is denied to witnesses to complaint of violations of the immunity guidelines, their status as a "rule" becomes relevant, if at all, only in the context of an intradepartmental disciplinary proceeding against an agent of the Department of Justice for violation of them. To deny standing to witnesses to

challenge departmental violation, however, not only ignores the major public interest in the control of discretionary executive behavior, but also the manifest particularized interests of witnesses as well as the judicial process in protections promised by the guidelines.

Standing alleged here must be viewed in the light of the prevailing federal standards, under which the relevant question concerns the relationship between the status of the parties and the legal infringement alleged. Flast v. Cohen, 392 U.S. 83 (1968). In the recent development of the federal law of standing, a bifurcated test has evolved. First, the party asserting standing must allege injury in fact, economic or otherwise; second, the party must allege that the interests which they assert are arguably within the "zone of interests" sought to be protected or regulated by the constitutional provision, statute or rule under which the infringement arises: Association of Data Processing Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970). In the present instance, the witnesses indisputably meet the first branch of the test: the injury with which they are faced includes a compulsion to testify before the grand jury under the immunity grant not complying with the applicable guidelines and procedures, and possible incarceration in the event a continuing refusal to testify.

Similarly, the witnesses in this instance clearly fall within the zone of interest sought to be protected by guidelines, as reference to the guidelines themselves shows. In relevant parts, the guidelines specify a range of questions which must govern consideration of an immunity application:

> How likely is it that the witness will refuse to testify even if ordered to do so by the court? Would there be an effective sanction against this contemptuous conduct if it occurred? Would we be willing to employ such a sanction, or might special circumstances, such as a close family relationship between the witness and defendant, make it inequitable to do so? Might the witness' compelled testimony lead to unfortunate collateral consequences, such as physical reprisals by the defendant?

On their face, therefore, the guidelines govern interests which are not even arguably exclusive to the Department of Justice, but which involve considerations of the most fundamental importance to the witness. Questions concerning the effects of compelled testimony on close personal relationships of a witness, or the possibility of reprisal by those affected by compelled testimony involve a zone of interests, and create a set of claims which are not only central and personal to prospective witnesses, but are, indeed, exclusive to them. In light of the well established trend in federal adjudication on the question of standing toward liberal construction in favor of reaching the merits of a litigant's claim(once the tribunal is

assured there is sufficient concreteness and the parties are sufficiently adverse to satisfy the case or controversy requirements) it would be a major retrogression to deny, in this case, standing to a party injured by alleged violation of a rule explicitly directed toward and concerned with the protection of interests of the moving party. The guidelines in question, constraining the exercise of discretionary behavior by agents of the Department of Justice, are directed both toward the due administration of justice and toward the thoughtful consideration and protection of interests of grand jury witnesses; their violation in this case will result in injury to the witnesses of ample magnitude, including possible loss of liberty, to ground their standing under any of the currently applicable formulations of the federal law of standing. Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); Association of Data Processing Organizations v. Camp, supra; Barlow v. Collins, supra; Arnold Tours v. Camp, supra.

IV. CONCLUSION

For the foregoing reasons, the District Court erred in finding the appellants in contempt and the appellants had just cause to refuse to answer the questions propounded to them. Appellants ask that this Court vacate the decision of the court below and remand the case so that the defects alleged herein may be remedied.

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